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No. 257

Supreme Court of the United States

October Term, 1960

H. K. PORTER COMPANY, INC., *ET AL.*, APPELLANTS,

versus

CENTRAL VERMONT RAILWAY, INC., *ET AL.*,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF OF H. K. PORTER COMPANY, INC., ET AL., APPELLANTS, IN OPPOSITION TO MOTION TO AFFIRM

STATEMENT

Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company, Appellants, file this brief in opposition to the Motion to Affirm filed by the Appellees.

ARGUMENT

The Appellees throughout their Motion to Affirm maintain that the Interstate Commerce Commission lacked jurisdiction to decide the issues presented by the complaints, duly filed before that body, because the rates they assessed on asbestos and related commodities from the mines in Quebec to southern destinations were made on a combination basis. They contend that the Commission has jurisdiction only over international joint rates, which they might voluntarily establish, and argue that in the establishment of such rates they participated in the making or construction of the level of the rates through express agreement with all carriers participating in the movement of traffic under the rates. They argue, however, that in the case of combination rates no such agreement between the carriers exists. It is contended that each participating carrier is responsible only for the rates actually published and filed by them with the Interstate Commerce Commission. The Appellees ignore entirely the doctrine of **implied agreement.**

The facts and circumstances of the instant case show beyond doubt that there was and is an **implied agreement or arrangement** between the participating carriers involved to transport asbestos and related products from Quebec origins to southern destinations on through rates which in law cannot be distinguished legally from single factor joint rates. While Appellants in their Jurisdictional Statement dealt with the legal nature of the combination rates and showed that the rates assessed the "Southern Consumers" from the standpoint of the jurisdiction of the Commission could not be legally distinguished from the single factor joint rates assessed their competitors in official territory, it is deemed desirable in this Reply to call the Court's attention to certain pronouncements made by this Court in connection with similar factual rate situations.

In every substantial sense through rates constructed out of a proportional rate and a local rate and applied on traffic moving under through bills of lading over through routes are on the same level as single factor joint through rates. In *Kansas City S. R. Co. v. C. H. Albers Com. Co.*, 223 U. S. 573 (1911), this Court said:

> Section 6 of the interstate commerce act, as it existed at the time, laid upon every carrier subject to the provisions of the act the duty of filing with the Commission and publishing schedules of the rates to be charged for the transportation of property over its road, provided for changing and superseding such rates by new schedules so filed and published, and made it unlawful for such a carrier to depart from any rate so established and in force at the time. That section also required connecting carriers, agreeing upon joint through rates, to file schedules thereof with the Commission, made similar provision for changing and superseding rates so established, and likewise prohibited any deviation from an established joint rate while remaining in force. Other sections contained provisions against unreasonable rates, unjust discriminations, undue preferences, and the like. The chief purpose of the act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed. **In every substantial sense local rates and joint through rates were placed on the same level.** Both required to be openly established and uniformly applied. True, the carriers were obliged to establish local rates, and were left free to agree upon joint through rates, or not, as they chose; but if they did agree thereon, the rates could become legally operative only by being established as prescribed in the act. The true effect of the

statute in this regard—we speak of the statute as it existed in 1901—is clearly stated in the opinion of the circuit court of appeals for the eighth circuit, in *Chicago, R. & Q. R. Co. v. United States*, 85 C. C. A. 194, 157 Fed. 830, 833, as follows:

"If an initial carrier accepts traffic for transportation and issues its bill of lading over a route made up of connecting roads for which no joint through rate has been published and filed with the Commission, the lawful rate to be charged is the sum of the established local rates published and filed by the individual roads; or if, as was the case here, there is a local rate over one road and a joint rate over the others for the remainder of the route, all published and filed with the Commission, the lawful through rate to be charged is the sum of the local and joint rates. By failing to establish or concur in a joint through rate for traffic accepted for interstate transportation, **each participating carrier impliedly asserts that the rate which it has duly established, published, and filed for its own line shall be a component part of the through rate to be charged.** It is competent for carriers, if conditions justify it, to make their proportions of a through rate less than the local charges upon their own lines, but in doing so they should observe legal methods, and if no action to that end is taken, they in effect adhere to the rates established, published, and filed by them as applying not only to local but to through traffic." (Emphasis supplied.)

Attention of the Court is called to the fact that in the instant case the initial carriers originating the asbestos traffic in the province of Quebec issued through bills of lading and collected the through transportation charges. It is certain that the Appellees operating in the United States between East Alburgh and Newport, Vermont, on the one hand, and southern destinations on the other hand, by their actions and conduct have impliedly asserted that the local rates published and assessed by them.

from the said points in Vermont to the southern destinations are component parts of through rates.

Appellees in their Motion to Affirm at page 22 state: "The decision in the *Sloss-Sheffield case* indicates that the rates there involved were joint rates" and leave the impression that such joint rates were single factor rates.

Appellees ignore entirely that in the *Sloss-Sheffield case*, 269 U. S. 217, this Court held that a through rate constructed out of proportionals could not be legally distinguished from a single factor joint rate. At pages 233 and 234 of 269 U. S. this Court said:

> The fact that the joint rate had been constructed out of existing proportional rates is not of legal significance. The rates complained of were not merely the aggregate of individual local or proportional rates customarily charged by the respective lines for the transportation included in the through routes. The rates in question were strictly joint through rates. Each through rate was complained of as a unit. Compare *Parsons v. Chicago & Northwestern Ry. Co.*, 167 U. S. 447, 455, 456, 17 S. Ct. 887, 42 L. Ed. 231. A single charge was made for the transportation from point of origin to point of destination.
>
> Nor does the fact that the connecting carriers may have been induced to enter into these agreements for joint through rates, because the Interstate Commerce Act had declared this to be the general duty of all carriers, prevent the agreement actually entered into from being the joint act of these carriers. Every local or individual rate is likewise established pursuant to a duty. Whether a rate be individual or joint the Commission may enforce performance if the duty to establish it is neglected. The liability in the case at bar arises out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier. Every carrier who participates in the infliction of this wrong is liable in solido like every other tort-feasor. The tariff rate, although unlawful

because excessive, was as between shipper and carrier the only legal rate. Neither would have been at liberty to avail itself of more favorable rates for any part of the through carriage. Compare *Baltimore & Ohio Southwestern R. R. Co. v. Settle*, 260 U. S. 166, 171, 43 S. Ct. 28, 67 L. Ed. 189. The Louisville & Nashville, the initial carrier, exacted the excessive joint rates on behalf of itself and of all of the connecting carriers who with it were parties to the joint through rates.

It is respectfully submitted that the doctrine pronounced by this Court in the *Sloss-Sheffield case* is applicable in the instant case even though international traffic is involved. This is evidenced by the fact that this Court in *Great Northern Ry. Co. v. Sullivan*, 294 U. S. 458, cited the *Sloss-Sheffield case* in support of its holding that it is the through transportation charge which concerns the shipper or user of transportation services and not the component parts of the through rates, and its further holding that the through transportation charges must be found unlawful before the Commission under the Act is authorized to make an award of damages.

Appellees took exception to Appellants' statement in their Jurisdictional Statement that should the Commission be deprived of jurisdiction in the instant case, all shippers in the United States would be at the mercy of the Appellees insofar as assessed transpotration charges are applied on international traffic. Appellees contend the Commission has jurisdiction only over one component part of the through transportation charge assessed the "Southern Consumers" and that the complaints should assail only the lawfulness of that part of the through rate applying from East Alburgh and Newport, Vermont, to the southern destinations. Attention of this Court is called to the fact that the complaints assail the lawfulness of the single factor joint rates from the Canadian origins to destinations

in official territory, and the through rates assessed "Southern Consumers"; By Appellees' method of election as to tariff publications they have made it impossible to compare rates assessed competitors in official territory from the international boundary with those assessed "Southern Consumers" from East Alburgh and Newport. Again it should be noted that under the holdings of this Court in the *Sullivan case* the Commission, if it is to award damages, must find that the through transportation charges are unreasonable.

Appellees in their Motion to Affirm and throughout the litigation before this Commission and the district court have ignored the fact that it is their participation in the assessment of unlawful through transportation charges which makes them liable for accounting. They do not have to account to anyone as to the method of tariff publication so long as such tariffs are constructed and filed in accordance with Section 6 of the Act. It will be noted that throughout the Appellees' Motion to Affirm it is continuously reiterated that combination rates are assessed the "Southern Consumers". They refrain from stating that a proportional rate is involved and that this proportional rate is an inherent part of a through rate, and that the local rates from the Vermont points are also inherent parts of the through rates. Appellees ignore the fact that the Canadian railroads issued the original bills of lading and collected the transportation charges for the benefit of all participating carriers performing the transportation service. Appellees ignore entirely the doctrine of **implied agreement** and try to escape their responsibility under the law by simply asserting that they elected to establish single factor rates on asbestos to points in official territory and thus conferred jurisdiction on the Commission to determine their lawfulness, whereas, they had, by their election, conferred no such jurisdiction on the Commission when

they participated in through rates made on a combination basis. From the above excerpts from this Court's decisions in the past and from the argument advanced in the Appellants' Jurisdictional Statement, it is obvious that the Appellees' contentions in the instant case are unsound.

As stated by the Appellees at page 18 of their Motion to Affirm "Either the Commission had jurisdiction to consider and dispose of the complaints before it or it did not." With this statement we agree. We have shown above, and in our Jurisdictional Statement previously filed, the mere fact that the through rates assessed the "Southern Consumers" were made on a combination basis over an interior point in the United States did not deprive the Commission of jurisdiction to determine the lawfulness of the through transportation charges upon proper complaint. The through rates assessed the "Southern Consumers" cannot be legally distinguished from the single factor joint rates assessed their competitors in official territory. The Commission specifically found that the Appellees had not complied with the Act and established rates from the international boundary line. Clearly the doctrine applied by this Court in *News Syndicate Co. v. N. Y. Central R. Co.*, 275 U. S. 179 applies in the instant case.

The Appellees also argue that the Commission is deprived of jurisdiction in the instant case because in some cases heretofore the Commission has refrained from exercising jurisdiction. The attention of the Court is called to the fact that in *Newsprint Paper to Detroit*, 161 I. C. C. 637, decided in 1930, the Commission exercised jurisdiction because the carriers operating in the United States had failed to establish and publish rates from the middle of the Detroit River, which is the international boundary line, to Detroit. It cannot be argued that the Commission has engaged in a uniform practice.

While the interpretation given to a statute by those charged with its application and enforcement is entitled to considerable weight, it is hardly conclusive. *County of Marin v. United States*, 356 U. S. 412, 420; *United States v. Missouri & Pacific R. Co.*, 278 U. S. 269, 280. In the *Missouri Pacific case*, cited, this Court held that "The rule does not apply in cases where the construction is not doubtful". The construction of the statute involved in the instant case certainly does not fall in the doubtful category for this Court has settled its interpretation in various decisions including among others, *Kansas City S. R. Co. v. C. H. Albers Com. Co., supra; Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., supra; News Syndicate Co. v. N. Y. Central R. Co., supra; Lewis-Simas-Jones Co. v. Sou. Pacific Ry. Co.*, 283 U. S. 654; *Great Northern Ry. Co. v. Sullivan, supra.*

The very most the Appellees can claim in this case is that the Commission has been inconsistent and with this the Court is not concerned. *Virginia Ry. Co. v. U. S.*, 272 U. S. 658. Even though the Commission in some instances has refrained from exercising jurisdiction, the Commission is not bound by the former error of its ways and neither is this Court. An administrative ruling is not so sacrosanct as to be beyond the correction of error; it need not perpetuate error. *American Chicle Co. v. United States*, 316 U. S. 450.

The district court held that consistent interpretation by the Commission ought not to be set aside without a strong showing to justify departure and cited in support thereof *United States v. Leslie Salt Co.*, 350 U. S. 383, and *F. T. C. v. Bunte Bros.*, 312 U. S. 349. These decisions of this Court do not support application of the principles therein enunciated to the Interstate Commerce Commission. This Court in the *Bunte Bros. case* said it was treacherous business to translate implications drawn from one statute

to a totally different statute. The *Bunte Bros. case* involved the Federal Trade Commission, not the Interstate Commerce Commission; however, it should be noted that in the *Bunte Bros. case* this Court said at page 352: "Authority actually granted by Congress of course cannot be evaporated for lack of administrative exercise".

As we have heretofore pointed out in our Jurisdictional Statement, previously filed, the final decision in this case will have a far-reaching impact on industry in the United States which must rely on raw materials from an adjacent foreign country. The district court erroneously atomized the through transportation charges assessed "Southern Consumers" and considered only the proportional rate from the Canadian origins to East Alburgh and Newport, Vermont. The district court thereby divided an indivisible entity which was and is the through transportation charge assessed and as this Court has on many occasions stated, it is this entity which must be considered.

It is respectfully submitted that under the circumstances of the instant case, as revealed by the Commission's decision and pleadings filed with this Court, that the Appellees in participating in through rates made on a combination basis to southern destinations have *impliedly agreed* with all participating carriers performing the transportation service to southern destinations that the through rates assessed and collected are in fact on the same level legally speaking with the single factor joint rates assessed competitors in official territory.

CONCLUSION

For the reasons stated above and those set forth in our Jurisdictional Statement previously filed, these Appellants submit that the questions presented by this appeal are so substantial as to warrant plenary consideration by this Court on the merits. The motion to affirm should be denied, probable jurisdiction should be noted, and the decision and judgment of the district court should be reversed and set aside.

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Dated at Columbia, S. C.,
September 20, 1960.